

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
June 18, 2008 Session

JIMMY RAY ROGERS v. STATE OF TENNESSEE

**Appeal from the Circuit Court for Franklin County
No. 15457 Buddy D. Perry, Judge**

No. M2007-01404-CCA-R3-PC - Filed October 8, 2008

Petitioner, Jimmy Ray Rogers, appeals the post-conviction court's denial of post-conviction relief. After a review of the record, we determine that Petitioner received effective assistance of counsel. Consequently, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and ROBERT W. WEDEMEYER, JJ., joined.

Joseph S. Bean, Jr., Winchester, Tennessee, for the appellant, Jimmy Ray Rogers.

Robert E. Cooper, Jr., Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; J. Michael Taylor, District Attorney General and Stephen M. Blount, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Petitioner was indicted in November of 2003 by the Franklin County Grand Jury for driving on a revoked license, unlawful possession of drug paraphernalia, possession of a Schedule IV controlled substance, and introduction of contraband into a penal facility. The facts, as summarized by this Court on direct appeal, are as follows:

Kevin Smith, . . . , testified that at approximately 1:30 a.m. on May 20, 2003, he noticed the appellant driving a vehicle on Dinah Shore Boulevard. The license plate on [Petitioner's] vehicle was not illuminated. Officer Smith was also aware that [Petitioner's] driver's license had been revoked. Accordingly, Officer Smith activated the lights on his patrol car, and [Petitioner] drove his vehicle to the side of

the road and parked. As Officer Smith approached [Petitioner's] vehicle, he saw a long gun, which he believed to be a rifle, laying in the back seat of the vehicle. Officer Smith requested backup,

[Petitioner] was arrested, handcuffed behind his back, and placed in the back seat of Officer Smith's patrol car. The officers searched [Petitioner's] vehicle, discovering that the suspected weapon was a "pellet gun." The officers also discovered a green straw-like apparatus containing possible drug residue. After being placed in the rear of the patrol car, [Petitioner] repeatedly asked to speak with Sergeant McKinney. Ultimately, Sergeant McKinney returned to the vehicle and spoke with [Petitioner]. [Petitioner] asked Sergeant McKinney if he could go home without being charged. Additionally, [Petitioner] asked Sergeant McKinney, "[W]hy was we picking on small time people instead of big time people, that he was just a smoker." At trial, the officers recalled that [Petitioner] caused no problems while he was restrained in the patrol car.

After the search of [Petitioner's] vehicle was completed, a tow truck arrived at approximately 2:00 a.m. and removed [Petitioner's] vehicle from the side of the road. Officer Smith drove [Petitioner] to the Franklin County Jail where they pulled into a sally port, an area in which only law enforcement officers were allowed. Officer Smith helped [Petitioner] get out of the vehicle and then warned [Petitioner], "Look, if you've got anything on you you better give it up now, because if you walk in those doors with it, it's automatically a felony for introduction of contraband in a correctional facility." [Petitioner] denied possessing any contraband.

Officer Smith secured his weapon, then he and [Petitioner] proceeded through two locked sets of double doors into the booking area of the jail. Officer Smith stated that the booking area had a counter which the officers used to process paperwork. There were two "drunk tanks" located ten to fifteen feet away from the counter. Near the booking area were doors leading to cells which typically held prisoners. Inmates, particularly trustees, were allowed in the booking area.

Officer Smith took [Petitioner] to the counter for processing. Two officers were working in the booking area. One of the officers began [Petitioner's] paperwork, and the other officer prepared to search [Petitioner]. Prior to the search, [Petitioner] removed a small bag containing a green, leafy, plant material from his pants and relinquished custody of the bag to the searching officer. Officer Smith took custody of the bag.

The bag was submitted to the Tennessee Bureau of Investigation ("TBI") crime laboratory for testing. Agent Mark Eric Dunlap with the crime laboratory tested the material and confirmed that it was marijuana. The straw discovered in [Petitioner's] vehicle was not submitted for testing.

State v. Jimmy Ray Rogers, No. M2004-01277-CCA-R3-CD, 2005 WL 1848480, at *1-2 (Tenn. Crim. App., at Nashville, Aug. 3, 2005).

The original judgment forms indicate that the jury found Petitioner guilty of introduction of contraband into a penal facility, driving on a revoked license, and possession of drug paraphernalia. Petitioner received a nine-year sentence as a multiple offender for the conviction for introduction of contraband into a penal facility. The judgments reflect that the remaining convictions were merged into the conviction for introduction of contraband into a penal facility.

Petitioner subsequently sought an appeal to this Court. On appeal, Petitioner argued that the evidence was insufficient and that his sentence was excessive. *State v. Jimmy Ray Rogers*, 2005 WL 1848480, at *1. This Court concluded that Petitioner's conviction and sentence for introducing contraband into a penal institution should be affirmed; Petitioner's conviction for possession of marijuana should merge into his conviction for introducing contraband into a penal institution; a corrected judgment should be entered reflecting that Petitioner was found not guilty of possession of drug paraphernalia; and Petitioner's conviction for driving on a revoked license should be reinstated. We remanded the case to the trial court for sentencing on Petitioner's conviction for driving on a revoked license and for correction of the judgments. *Id.* at *6.

On remand, amended judgments were entered by the trial court. The amended judgments reflect that Petitioner was convicted of driving on a revoked license, possession of a Schedule IV controlled substance, and introduction of contraband into a penal facility. Petitioner was sentenced to eleven months and twenty-nine days for possession of marijuana and that conviction was merged into the conviction for introduction of contraband into a penal facility. Petitioner was sentenced to six months for driving on a revoked license, to be served concurrently with his nine-year sentence for introduction of contraband into a penal facility.

Petitioner filed a pro se petition for post-conviction relief on March 15, 2006. In that petition, Petitioner alleged that his conviction was: (1) based upon the "denial of effective assistance of counsel prior to trial, at trial, and at the direct appeal stage"; (2) based upon "non-existing elements contrary to the element requirements defined under the authority of . . . T.C.A. § 39-16-201(a)(1)"; (3) based upon the use of evidence gained pursuant to an unconstitutional search and seizure; (4) obtained by the use of illegal evidence; (5) obtained under the erroneous use of an unconstitutional jury instruction; (6) based on an unconstitutional jury charge instructing the jury that their verdict must be "unanimous;" and (7) based on an unconstitutional jury charge defining reasonable doubt. The post-conviction court appointed counsel to represent Petitioner, and an amended petition was filed. In the amended petition, Petitioner alleged that he received ineffective assistance of counsel when counsel failed to: (1) discuss the facts of the case; (2) investigate the facts of the case; (3) convey settlement offers to Petitioner; (4) impeach Officer Smith's testimony at trial; and (5) file a motion to suppress.

Evidence at the Post-conviction Hearing

At the post-conviction hearing, trial counsel testified that he represented Petitioner at trial only, as part of his job with the Public Defender's Office. At the time of the post-conviction hearing, trial counsel had been practicing law since December of 1987. Trial counsel testified that he discussed the facts, defenses, trial strategy, and possible pretrial motions with Petitioner.

Approximately two days prior to trial, trial counsel learned that there was a videotape of the vehicle stop. The morning of the trial, Petitioner and trial counsel viewed the videotape. According to trial counsel, Petitioner insisted on a speedy trial, so trial counsel did not move for a continuance. Trial counsel believed that the most effective strategy would be to attempt to limit the State's use of the videotape at trial.

Trial counsel admitted that the affidavit of Officer Smith stated that he stopped Petitioner for equipment violations and "ran his license and discovered they were revoked for DUI in 1994." On the videotape, Officer Smith asks Petitioner if his license was "still suspended or revoked." At trial, Officer Smith testified that he "had prior knowledge that [Petitioner's] license were [sic] revoked." Trial counsel testified that he chose not to question Officer Smith regarding the discrepancies in his statements for strategic reasons. Specifically, trial counsel testified:

There's a time to attack an officer, it happens. The majority of time and in this case we felt like our strongest argument was not to attack the credibility of the officer, but make the legal argument that (A) these items should no - - he wasn't willfully bringing them into the prison, into the jail, and secondly, that he wasn't even really in the jail yet, he was in a public area.

Trial counsel did not feel that he had an appropriate basis to file a motion to suppress the evidence. In fact, trial counsel chose not to concentrate on whether the stop of Petitioner's vehicle was supported by a violation of the lighted license plate law or Tennessee Code Annotated section 55-9-404 because Officer Smith had an additional reason, driving on a revoked license, to stop Petitioner. Trial counsel did not recall discussing the option of filing a motion to suppress with Petitioner and whether that motion would be proper based on the license plate violation.

Petitioner did not testify at the post-conviction hearing. After hearing the evidence at the post-conviction hearing, the post-conviction court determined:

The defendant has failed to meet his burden in this Post-Conviction matter. The defendant has failed to prove that the trial counsel's performance did not meet the threshold of competence demanded of attorney's in criminal cases.

The defendant's initial claim of ineffective assistance of counsel is that the attorney did not investigate the "stop" of the defendant. The proof established clearly that the attorney did investigate the stop and was aware of the issues presented. . . . The attorney viewed the video at the first available opportunity. The defendant demanded a speedy trial and desired to proceed with the trial. The video did not

appear to prejudicially hinder the defendant's trial strategy. The trial attorney was aware of the facts of the stop and the video did not appear to represent any facts that differed from the trial attorney's pre trial investigation.

The defendant then claims that the attorney was ineffective because he did not file a Motion to Suppress the evidence based on an illegal stop. . . . [T]he Court is not convinced that the stop of the defendant was illegal. . . . The proof at trial indicated that the officer knew the defendant and knew his revoked driver's license status. Trial counsel had investigated this fact prior to trial. Because of the officer's prior knowledge of the defendant's driver's license status, there was reasonable suspicion to justify the officer's stop regardless of the illuminated tag issue. There was no requirement for the trial counsel to file a Motion to Suppress based on the illuminated license tag issue, as the stop was valid due to the officer's prior knowledge of the defendant's revoked license.

The defendant further alleges that the trial attorney was ineffective because he did not cross-examine the arresting officer, Trial counsel explained that he chose not to attack the officer on the issue of the language he placed in his arrest warrant. . . . This is [sic] appears to be a well reasoned trial strategy and does not represent deficient legal representation.

Finally, the defendant claimed that the trial counsel failed to adequately communicate with the defendant. There was no proof presented to the court indicating that there was a lack of communication between counsel and the defendant.

Petitioner filed a timely notice of appeal challenging the post-conviction court's denial and dismissal of the petition for post-conviction relief. On appeal, Petitioner presents one issue for our review: whether the post-conviction court erred when it determined that trial counsel was not ineffective for failing to file a motion to suppress.

Analysis

Post-conviction Standard of Review

The post-conviction court's findings of fact are conclusive on appeal unless the evidence preponderates otherwise. *See State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). During our review of the issue raised, we will afford those findings of fact the weight of a jury verdict, and this Court is bound by the post-conviction court's findings unless the evidence in the record preponderates against those findings. *See Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997); *Alley v. State*, 958 S.W.2d 138, 147 (Tenn. Crim. App. 1997). This Court may not re-weigh or re-evaluate the evidence, nor substitute its inferences for those drawn by the post-conviction court. *See State v. Honeycutt*, 54 S.W.3d 762, 766 (Tenn. 2001). However, the post-conviction court's conclusions of

law are reviewed under a purely de novo standard with no presumption of correctness. *See Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001).

On appeal, Petitioner argues that the post-conviction court erred in denying his petition because he received ineffective assistance of counsel. Specifically, on appeal, Petitioner argues that trial counsel failed to file a motion to suppress the evidence. When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, the petitioner bears the burden of showing by clear and convincing evidence that (a) the services rendered by trial counsel were deficient and (b) that the deficient performance was prejudicial. *See Powers v. State*, 942 S.W.2d 551, 558 (Tenn. Crim. App. 1996); *see also* T.C.A. § 40-30-110(f). In order to demonstrate deficient performance, the petitioner must show that the services rendered or the advice given was below “the range of competence demanded of attorneys in criminal cases.” *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). “Because a petitioner must establish both prongs of the test to prevail on a claim of ineffective assistance of counsel, failure to prove either deficient performance or resulting prejudice provides a sufficient basis to deny relief on the claim.” *Henley*, 960 S.W.2d at 580.

As noted above, this Court will afford the post-conviction court’s factual findings a presumption of correctness, rendering them conclusive on appeal unless the record preponderates against the court’s findings. *See id.* at 578. However, our supreme court has “determined that issues of deficient performance by counsel and possible prejudice to the defense are mixed questions of law and fact . . . ; thus, [appellate] review of [these issues] is de novo” with no presumption of correctness. *State v. Burns*, 6 S.W.3d at 461.

Furthermore, on claims of ineffective assistance of counsel, Petitioner is not entitled to the benefit of hindsight. *See Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994). This Court may not second-guess a reasonably-based trial strategy, and we cannot grant relief based on a sound, but unsuccessful, tactical decision made during the course of the proceedings. *See id.* However, such deference to the tactical decisions of counsel applies only if counsel makes those decisions after adequate preparation for the case. *See Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

The post-conviction court herein found that Petitioner did not prove his allegations by clear and convincing evidence. Petitioner argues that *United States v. McKissack*, 76 F. Supp. 2d 836 (M.D. Tenn. 1999), supports his position that a motion to suppress would have been successful. In *McKissack*, the officer stopped the defendant solely for a violation of Tennessee Code Annotated section 55-9-404. At the time, Tennessee Code Annotated section 55-9-404(a) required:

Every motor vehicle and every trailer or semitrailer which is being drawn at the end of a train of vehicles shall carry at the rear a lamp of a type which exhibits a yellow or red light plainly visible under normal atmospheric conditions from a distance of five hundred feet (500’) to the rear of such vehicle, and such light shall be so constructed and placed that the number plate carried on the rear of such vehicle shall

under like conditions be so illuminated by a white light as to be read from a distance of fifty feet (50') to the rear of such vehicle.

On appeal from the grant of a motion to suppress the evidence in the trial court, the federal court determined that requiring all motor vehicles, not just those “drawn at the end of a train of vehicles,” to be illuminated in compliance with the statute would be “contrary to the plain meaning of the statute.” *McKissack*, 76 F. Supp. 2d at 838; T.C.A. § 55-9-404. The court concluded that when the officer stopped the defendant for a violation of the statute alone, he had no probable cause for the stop. *Id.* at 839. Consequently, the court ruled the stop illegal. *Id.* After *McKissack*, the legislature ultimately amended Tennessee Code Annotated section 55-9-404 in 2004 to include subsection (b), which reads:

The provisions of this section shall not apply to a single motor vehicle as is required in § 55-9-402, but shall only apply to the last motor vehicle being drawn at the end of a train or group of motor vehicles.

McKissack is distinguishable from the case herein. In *McKissack*, the defendant’s failure to illuminate the license plate was the sole reason for the stop. In the case herein, Officer Smith had reasonable suspicion to stop Petitioner based on his personal knowledge that Petitioner’s driver’s license was revoked. This ground alone would have supported Officer Smith’s stop of Petitioner. Petitioner did not present any proof at the post-conviction hearing to prove that the violation of the statute was the sole reason for the stop. Furthermore, trial counsel testified that the decision regarding the filing of a motion to suppress was a trial strategy. The decisions regarding trial strategy are not subject to review in hindsight. *Adkins*, 911 S.W.2d at 347. Petitioner is not entitled to relief on this issue.

Conclusion

For the foregoing reasons, the judgment of the post-conviction court is affirmed.

JERRY L. SMITH, JUDGE